

April 24, 2014

Lori Asuncion
Deputy City Attorney
Stockton City Attorney's Office
425 N. El Dorado Street
Stockton, CA 95202

Re: Your Request for Advice
Our File No. I-14-062

Dear Ms. Asuncion:

This letter responds to your request on behalf of a City of Stockton Planning Commissioner regarding the conflicts of interest provisions under Government Code Section 1090 et seq.¹ Because the Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. Based on the limited facts you provided, we are treating your request as one for informal assistance. For purposes of Section 1090, because your request does not provide specific information regarding a future government contract, the Planning Commissioner’s identity, or the name of the Planning Commissioner’s company, we are only providing informal assistance and do not deem this letter to meet the requirements to permit the Planning Commissioner to offer the letter into evidence in a Commission enforcement proceeding or criminal prosecution regarding Section 1090. (See Section 1097.1(c)(5).)

Please note that after forwarding your request to the Attorney General’s Office and the San Joaquin County District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).)

QUESTION

Prior to being appointed to the City of Stockton Planning Commission, a current member of the Planning Commission represented his company as a salesperson before the City on a prospective contract on which the company now intends to place a bid. Does Section 1090 prevent the City of Stockton from contracting with that company?

¹ All further statutory references are to the Government Code, unless otherwise indicated.

CONCLUSION

No. Section 1090 does not preclude either the City or the Planning Commissioner's company from entering into this contract. The Planning Commissioner will not be making a contract in his public capacity for purposes of Section 1090.

FACTS

You are the Deputy City Attorney for the City of Stockton and you write on behalf of a City Planning Commissioner. The Planning Commissioner also works for a private company as a salesperson/contractor for an Energy Management Company. He works primarily with cities, schools, and counties to upgrade lighting equipment to provide for more efficient and cost-effective energy needs.

In 2013, he was appointed as a City of Stockton Planning Commissioner. Prior to this appointment, he had made contact with city staff in connection with his outside job duties and began the early stages of an energy replacement project going so far as to begin an engineering assessment. Later, and subsequent to his appointment, these efforts continued, including a feasibility study which his company is currently conducting at no charge to the City. Should the study show the project to be viable, the company will be one of any number of companies to put in a bid on the energy replacement project in response to the City's request for proposals. The Stockton City Council will choose from among the bidding companies with no oversight or input by the Planning Commission.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

We typically employ a six-step analysis to determine whether a public official has a disqualifying conflict of interest under Section 1090.

Step One: Is the Planning Commissioner subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Planning Commissions and their members are covered by this prohibition.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);² 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Here, the City of Stockton may be releasing a request for proposals and will contract with the winning bidder. A contract is involved in the decision.

Step Three: Is the Planning Commissioner making or participating in making a contract?

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.) No contract is “made” and no duties attach until one party has offered and another has accepted and consideration is exchanged. But before this, there are “negotiations, discussions, reasoning, planning, and give and take,” all of which are instrumental in “making” the agreement. (*Stigall, supra*, at p. 569.)

Here, the Planning Commissioner is an employee of a company that could enter into a contract with the City by way of approval by the Stockton City Council. The Planning Commission has no input into contracts the City makes nor will any part of the decision come before the Planning Commission for recommendations to the City Council. The Planning Commission will not be participating in the decision.

The Attorney General’s office addressed a similar situation in which two firefighters had developed a firefighting protective mask and sought to sell the mask to their own city’s fire department. (80 Ops Cal. Atty. Gen. 41(1997).) The firefighters formed a private company and pitched their product to the fire chief. (*Ibid.*) The firefighters would not be involved as city employees if the contract moved forward beyond the fire chief to the city council, the body that

² We note that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

would actually be making the decision. Because the firefighters would not be making the contract, “including its embodiments,” and had no input into the procurement process, the Attorney General opinion concluded that there would be no Section 1090 violation.

Similarly here, the Planning Commissioner would have no input into the contract or any aspect of the contract leading to the actual agreement. It is the City Council, rather than the Planning Commission, who will enter into the contract with the Planning Commissioner’s company. You have stated that, as to this contract, the Planning Commission has no input into the City Council’s decision-making process at any stage. The Planning Commissioner is therefore not “making” a contract for the purposes of Section 1090. Given this, we do not reach the following steps of the analysis.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl